

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 05-cv-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA’S MOTION FOR PROTECTIVE ORDER
AND INTEGRATED MEMORANDUM IN SUPPORT**

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“the State”), and, pursuant to Fed. R. Civ. P. 26 and 33(a), respectfully moves the Court for an Order that it not be required to respond to the Amended First Interrogatories propounded by Defendants Cargill, Inc. (“Cargill”) and Cargill Turkey Production, LLC (“Cargill Turkey”), which were served upon the State on August 22, 2006.¹

I. INTRODUCTION

On August 11, 2006, Cargill served the State with its First Interrogatories and Requests for Production of Documents to Plaintiffs. This set of discovery propounded interrogatories numbered 1-30. On that same date, Cargill Turkey also served the State with its First

¹ The State expressly reserves all of its other objections to Cargill and Cargill Turkey's Interrogatories beyond those based upon the excessive number of discrete subparts, including but not limited to objections based upon attorney-client privilege and work product protection, relevancy, burden, etc. Because, based upon the arguments and authorities set forth herein, Cargill and Cargill Turkey will be required to reformulate and limit their Interrogatories, it would be pointless and wasteful to set forth objections to the Interrogatories in their present form and number of discrete subparts.

Interrogatories and Requests for Production of Documents to Plaintiffs. The Cargill Turkey set of discovery propounded interrogatories numbered 1-41.

On August 14, 2006, the State informed Cargill and Cargill Turkey that the number of interrogatories in each set of interrogatories exceeded twenty-five, the number allowed by Federal Rule of Civil Procedure 33(a). (Letter from D. Sharon Gentry to Theresa Noble Hill, Aug. 14, 2006 [Ex. 1].) The State requested that Cargill and Cargill Turkey withdraw, revise, and resubmit the Interrogatories in compliance with federal and local rules. *Id.*

On August 22, 2006, Cargill and Cargill Turkey served the State with their respective Amended First Interrogatories and Requests for Production of Documents to Plaintiffs. Cargill's Amended First set propounds interrogatories numbered 1-17 [Ex. 2]. Cargill Turkey's Amended First set propounds interrogatories numbered 1-18 [Ex. 3]. These "amended" interrogatories, however, still contain separate, discrete subparts which result in them greatly exceeding the limit of twenty-five interrogatories. Accordingly, on August 28, 2006, the State again wrote to Cargill and Cargill Turkey pointing out that many of the interrogatories contained separate and discrete subparts that should be counted as separate interrogatories. (Letter from G. Sharon Gentry to Theresa Noble Hill, Aug. 28, 2006 [Ex. 4].) The State explained, for example, that:

Each of Cargill Inc.'s Amended Interrogatories asks the State to provide information for 'each Cargill entity,' of which there are two. In addition, some Interrogatories ask the 'factual and legal basis' for the State's claims, as well as the names of witnesses. Others ask for the factual basis only, but again, those also request names of witnesses. Each Interrogatory that contains such language can fairly be interpreted to constitute five or six separate questions.

Cargill Turkey's Amended Interrogatories are also excessive. For example, Interrogatory No. 3 contains seven itemized subparts, and requests dates, facts, witnesses and documents for each. Other interrogatories are similarly constructed.

Id. The State again requested Cargill and Cargill Turkey to “withdraw, revise, and resubmit its Amended First Interrogatories in compliance with federal and local rules.” *Id.* As required by the Local Rules, the parties met and conferred on this issue on August 30, 2006, but were unable to reach agreement on the matter. Cargill and Cargill Turkey filed their Motion to Compel, or in the alternative for leave to increase the number of interrogatories permitted to be served on September 1, 2006. The State has made a separate response to this Motion to Compel. The State now separately seeks a protective order shielding it from the expense and burden of having to respond to excessive and burdensome number of interrogatories from two closely related defendants with the same counsel.

II. ARGUMENT

A. The State’s Proper Procedural Recourse Is To Move For a Protective Order

"When a party believes that another party has asked too many interrogatories, the party to which the discovery has been propounded should object to all interrogatories or file a motion for protective order." *Allahverdi v. Regents of the University of New Mexico*, 228 F.R.D. 696, 698 (D.N.M. 2005); *see also Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 104-05 (W.D.N.C. 1993) (party claiming opponent exceeded number of interrogatories "could have avoided much of the burden of responding to these interrogatories if it had moved the Court for a protective order prior to answering any of the interrogatories on this basis"). Courts have held that if a party served with what it believes is an excessive number of interrogatories answers some of the interrogatories but not others, the answering party waives the objection as to excessive number. *Allahverdi*, 228 F.R.D. at 698; *Herdlein*, 147 F.R.D. at 105.

The reason for requiring the served party to object or file a motion to compel instead of selectively answering interrogatories is to prevent the served party from strategically omitting the

most prejudicial information asked for in the interrogatories. *Herdlein*, 147 F.R.D. at 104. This allows the propounding party to have interrogatories of its own choosing answered fully and completely. *Herdlein*, 147 F.R.D. at 104.

B. Cargill and Cargill Turkey's Interrogatories Exceed the Limit

The number of interrogatories served on the State by Cargill and Cargill Turkey exceeds the limits allowed under the rules, and the interrogatories are therefore improper.

1. Discrete, Separate Subparts Must be Counted Separately

Federal Rule of Civil Procedure 33(a) provides that "any party may serve upon any other party written interrogatories, not exceeding twenty-five in number including all discrete subparts, to be answered by the party served." Fed. R. Civ. P. 33(a). The Advisory Committee Notes to Rule 33(a) provide further explanation by noting that parties cannot evade the number limitation by joining several subparts into one interrogatory if those subparts ask about discrete, separate subjects. Fed. R. Civ. P. 33(a) Advisory Committee Notes to the 1993 Amendments, subdivision (a).

In addition, LCvR 33.1 is consistent with Rule 33(a) and the accompanying Notes by stating that subparts within numbered interrogatories will be counted as separate interrogatories. The Local Rule does allow that interrogatories "inquiring as to the existence, location and custodian of documents or physical evidence" will be construed as a single interrogatory. This exception clarifies that all other interrogatories, including subdivisions of one numbered interrogatory, shall be construed as separate interrogatories. As one case relied upon by the Cargill entities noted, local rules are a checkpoint beyond which a party may not proceed without evidencing the good cause which should be a precedent to any discovery, and that discovery is a litigating tool which should be used with discretion. *Lykins v. Attorney General*, 86 F.R.D. 318,

319 (E.D. Va. 1980). Consequently, the Local Rule requires, as does the Federal Rule and the case law, that separate and discrete subparts or subdivisions will be construed as separate interrogatories.

Because there is no definition of the term “discrete subparts” in Rule 33, the federal courts have been called upon to interpret it. In *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997), the court determined that a subpart was part of the primary interrogatory and not discrete if it was “logically or factually subsumed within and necessarily related to” the primary question. *Kendall*, 174 F.R.D. at 685. If, on the other hand, the first question could be answered fully without answering the second question, and the second question was totally independent of the first, then the subpart was a discrete separate question. *Kendall*, 174 F.R.D. at 685. The key is the subpart's ability to stand alone. *Kendall*, 174 F.R.D. at 685. Similarly, if separate calculations are needed to respond to the subparts, then they are discrete or separate, even though the subject of the two calculations may be related. *Kendall*, 174 F.R.D. at 686. The *Kendall* court found interrogatories asking about (1) a party’s qualifications and (2) about supporting documents to contain two questions, because the second question is totally independent of the first and not “factually subsumed within and necessarily related to the primary question.” *Kendall*, 174 F.R.D. at 686; *see also Nyfield v. Virgin Islands Telephone Corp.*, 200 F.R.D. 246, 248 (D.V.I. 2001) (finding interrogatories asking about (1) receipt of benefits and (2) efforts to comply with the terms of those benefits constituted two questions. The court also found that interrogatories asking about (1) elimination of job positions or about job transfers and also asking (2) about the identities of persons involved in those decisions constituted two questions. Courts easily recognized independent questions joined in a single interrogatory as constituting multiple interrogatories. As demonstrated below, Cargill and

Cargill Turkey have asked questions with far more subparts than these examples, frequently asking about factual assertions against each of the two Cargill entities named in the State's lawsuit, legal positions, and supporting witnesses in a single numbered interrogatory.

Courts have also used the "common theme" approach in determining if the subparts of an interrogatory are "discrete." Referring to Wright and Miller's treatise on Federal Practice for guidance, the court in *Williams v. Board of County Commissioners of Wyandotte County*, 192 F.R.D. 698, 701 (D. Kan. 2000), stated that interrogatories concerning a common theme should be considered one interrogatory:

It would appear that an interrogatory containing subparts directed at eliciting details concerning the common theme should be considered a single question, although the breadth of an area inquired about may be disputable. On the other hand, an interrogatory with subparts inquiring into discrete areas is more likely to be counted as more than one for purposes of the limitation." 8A Charles A. Wright et al., *Federal Practice and Procedure* § 2168.1, at 261 (2d ed. 1994).

Cargill and Cargill Turkey's Interrogatories regularly combine questions about discrete areas in a single numbered interrogatory. Cargill and Cargill Turkey have thus propounded too many interrogatories.

2. Many Of Cargill's and Cargill Turkey's Interrogatories Contain Embedded Separate, Discrete Questions

Both Cargill's and Cargill Turkey's Interrogatories exceed the limit of 25 discrete subparts. By way of example, eleven of Cargill's seventeen Interrogatories,² and four of Cargill Turkey's eighteen Interrogatories,³ follow the same form:

Interrogatory No. []: Separately for each Cargill entity at issue, state with particularity the factual and legal basis for the allegation contained in ¶ []

² Cargill Interrogatories 1, 2, 3, 4, 9, 10, 11, 13, 15, 16, and 17 use this pattern.

³ Cargill Turkey Interrogatories 11, 12, 13, and 14 use this pattern.

of Your Amended Complaint that [statement of allegation in the Complaint] and identify every witness upon whom You will rely to establish each fact.

In their "Definitions" at the beginning of their Interrogatories, Cargill and Cargill Turkey define "Cargill, Inc." or "Any Cargill Entity" as "Cargill, Inc. and its affiliated companies (including but not limited to Cargill Turkey Production, LLC and Cargill Meat Solutions Corporation), subsidiaries or divisions, and any employee, attorney, agent or other representative thereof." [Ex. 2 & 3]

Each of these "factual and legal basis" Interrogatories contains at least six discrete, separate subparts: (1) Cargill, Inc. factual issues; (2) Cargill Turkey factual issues; (3) Cargill, Inc. legal issues; (4) Cargill Turkey legal issues; (5) identification of every witness for Cargill, Inc. factual issues; and (6) identification of every witness for Cargill Turkey factual issues. Each of these six questions is logically separate from each of the others, and could be answered without answering any of the others. They are not "factually subsumed within and necessarily related to the primary question." *Kendall*, 174 F.R.D. at 686. Nor are they questions in which each subpart refers to some common theme, unless the facts and the law are the same thing, and both the facts and the law are the same thing as Cargill and Cargill Turkey, and all four of them together are the same thing as the witnesses. Clearly, this is not the case, and these subparts are truly discrete

Thus, Cargill's eleven interrogatories following this pattern, each with six discrete subparts, constitute 66 discrete subparts, while Cargill Turkey's four interrogatories with six such subparts constitute 24 discrete subparts. Cargill's Interrogatory 15, based on this pattern, asks about the allegations from four separate paragraphs of the Amended Complaint, compounding this excess even further.

Both Cargill and Cargill Turkey use another, similar form of interrogatory asking the State "for each Cargill entity" to "state completely and in detail the facts" of certain of the State's allegations and "identify every witness upon whom You will rely to establish each fact." This pattern of interrogatory has four logically independent and discrete subparts: Cargill facts, Cargill Turkey facts, Cargill fact witnesses and Cargill Turkey fact witnesses. Cargill uses this pattern six times,⁴ while Cargill Turkey uses it four times.⁵ Consequently, Cargill's six interrogatories with four discrete subparts each constitute an additional 24 discrete subparts, while Cargill Turkey's four interrogatories with four discrete subparts each constitute an additional 16 discrete subparts.

The fact that Cargill has not numbered the subparts of its interrogatories does not change the fact that, if the interrogatories require discrete pieces of information, the "interrogatories are to be counted as if the subparts were specifically itemized." *Prochaska & Assocs. v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 155 F.R.D. 189, 191 (D. Neb. 1993). Indeed, one of the cases Cargill and Cargill Turkey rely upon would count such Interrogatories as containing discrete, separate subparts: the basic questions and then the identity of witnesses. *See Nyfield*, 200 F.R.D. at 248 (ruling that an interrogatory that asked both about the reason for elimination of plaintiff's position and then the identity of those involved in the decision making process would be counted as two questions).

Cargill and Cargill Turkey are also seeking all evidence about many legal claims the State has asserted against Defendants (Cargill Interrogatory No. 10 (CERCLA), No. 11 (Solid Waste Disposal Act), No. 13 (nuisance under Oklahoma law, without limiting to public or

⁴ Cargill Interrogatories 5, 6, 7, 8, 12, and 14 use this pattern.

⁵ Cargill Turkey Interrogatories 15, 16, 17, and 18 use this pattern.

private nuisance), No. 14 (nuisance under federal law), No. 16 (trespass); and Cargill Turkey Interrogatory No. 17 (unjust enrichment).) But a single interrogatory seeking evidence supporting all elements of a legal claim is overly broad. *Security Insurance Co. of Hartford v. Trustmark Insurance Co.*, 2003 WL 22326563, *1 (D. Conn. Mar. 7, 2003). "[A] scope of interrogatory defined by a 'common theme' is not sufficiently expansive to include an entire claim, for if such were the case a party could simply pose interrogatories requiring that the opposing party describe in detail all evidence supporting the allegations in Count X. Under no theory would such an interrogatory be proper." *Security Insurance*, 2003 WL 22326563, *1 (emphasis added). Interrogatories that seek information about legal claims must be broken down by elements, and the subparts considered distinct, "one for each element . . . which seek information as to evidence . . . supporting the particular element." *Security Insurance*, 2003 WL 22326563, at *1

Likewise, by way of example, Cargill Turkey has propounded the following Interrogatories that clearly contain discrete, separate subparts that should be counted as more than one interrogatory:

Interrogatory No. 7: Please describe the trophic state of each lake or reservoir within the Illinois River Watershed for each season of the year since 1952, and in doing so, state all evidence and identify all documents that relate to any such trophic state, including, but not limited to sampling, analysis, reports, studies, findings, recommendations, and the cause(s) for any observed eutrophication.

This Interrogatory asks for (1) a description of the trophic state of each lake or reservoir by season for a period of fifty-four years, then asks for (2) a description of all evidence, (3) the identification of all documents, and then (4) the causes for any eutrophication. Each of these four separate questions is logically separate and independent from each of the others. Each could be answered fully without answering any of the others. Again, even under a case relied upon by

Cargill and Cargill Turkey themselves, this Interrogatory must be considered to encompass four questions, not even considering the request for information on each of four seasons for a fifty-four year period for each lake or reservoir in the IRW. *Kendall*, 174 F.R.D. at 686. (holding that since "the first question asks for a description of qualifications" and "[t]he second question asks for a description of documents," the Interrogatory is an example "of independent questions being improperly combined into one interrogatory"); *see also Willingham v. Ashcroft*, 226 F.R.D. 57, 60 (D.D.C. 2005) (ruling separate request for documents in an interrogatory counts as a separate, discrete question); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10-11 (D.D.C. 2004) (ruling that subparts of an interrogatory that first demand information and then demand the documents pertaining to the information count as separate interrogatories).

Two final examples further illustrate the excessive number of discrete subparts. Cargill Turkey served the following Interrogatory No. 3:

Interrogatory No. 3: Please state the date (or year, if an exact date is not known) when You first became aware that poultry industry operations might be a potential source of:

- a. phosphorus / phosphorus compounds
- b. nitrogen / nitrogen compounds
- c. arsenic / arsenic compounds
- d. zinc / zinc compounds
- e. copper / copper compounds
- f. hormones; and/or
- g. microbial pathogens

in the Illinois River Watershed and discuss with particularity the facts, witnesses and/or documents leading to Your awareness.

This Interrogatory is a poster child for a question containing multiple, separate questions within. First, the interrogatory asks for dates of awareness the poultry industry might be a source of seven different pollutants. Second, it asks for the supporting facts "with particularity." Third, it asks for identification of witnesses leading to the awareness of each of the different pollutants.

Fourth, it asks for the identification of documents leading to the awareness of each of the different pollutants. Each of these four separate questions is logically separate and independent from each of the others. Each could be answered fully without answering any of the others. Thus, this Interrogatory contains at least four and up to twenty-eight separate questions when considering the seven discrete constituents for which each of the four questions are to be answered. Similarly, Cargill Turkey's Interrogatory No. 4 asks for (1) the date the State became aware that elevated levels of pollutants caused eleven discrete kinds of harm, (2) the facts, stated with particularity, (3) the witnesses leading to the State's awareness, and (4) the documents leading to that awareness. Once again, this constitutes at least four discrete questions, and up to forty-four if the Court considers separately each of the eleven named forms of harm for each constituent. Clearly, these Interrogatories are an attempt to evade the limitation set by Rule 33(a).

This is not a close case in which a defendant has just barely stepped over the line. Cargill has put forward at least 90 discrete subparts, while Cargill Turkey has put forward at least 74 (and possibly as many as 138 if the constituents and harms of Interrogatories 3 and 4 are counted separately). What is more, because much of the information sought will not appropriately be available until the State provides the reports of its testifying experts, this excessive exercise in discovery by interrogatory at this juncture will yield only a fraction of the ultimately available information at considerable expense. The Court should protect the State from this abuse of discovery by interrogatory.

III. CONCLUSION

WHEREFORE, premises considered, the State requests that the Court enter a protective order pursuant to Federal Rule of Civil Procedure 26(c), providing that discovery not be had, for

the reason that the number of Interrogatories propounded by Cargill and Cargill Turkey on August 22, 2006, together with their discrete subparts, exceeds the number allowed under Rule 33(a).

Respectfully submitted,

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September 19, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2006, I electronically transmitted the attached document to the following:

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